

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JENNIFER J. ELDRED,	)
	) No. CV-08-00149-JPH
Plaintiff,	)
	) ORDER GRANTING DEFENDANT'S
v.	) MOTION FOR SUMMARY JUDGMENT
	)
MICHAEL J. ASTRUE, Commissioner	)
of Social Security,	)
	)
Defendant.	)
	)
	)

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on November 14, 2008. (Ct. Rec. 14, 16). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney David Blume represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 9.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14.)

**JURISDICTION**

Plaintiff protectively filed applications for SSI benefits and Title II benefits on November 4, 2004, alleging onset as of

1 October 1, 2001. (Tr. 62-64, 295-297.) The applications were  
2 denied initially and on reconsideration. (Tr. 47-48, 51-53, 286-  
3 288, 290-293.) Administrative Law Judge (ALJ) Richard A. Say held  
4 a hearing on August 2, 2007. (Tr. 326-343.) Plaintiff, represented  
5 by counsel, her companion/roommate Samantha Liljestrand, and  
6 vocational expert Diane Kramer testified. On October 9, 2007, the  
7 ALJ issued a decision finding that plaintiff was not disabled.  
8 (Tr. 23-35.) The Appeals Council denied a request for review on  
9 April 15, 2008. (Tr. 4-6.) Therefore, the ALJ's decision became  
10 the final decision of the Commissioner, which is appealable to the  
11 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
12 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
13 May 7, 2008. (Ct. Rec. 1,4.)

#### 14 **STATEMENT OF FACTS**

15 The facts have been presented in the administrative hearing  
16 transcript, the ALJ's decision, the briefs of both Plaintiff and  
17 the Commissioner, and will only be summarized here.

18 Plaintiff was 28 years old at the time of the hearing and has  
19 a high school education. (Tr. 329.) She has worked as a  
20 cook/fryer, dishwasher, and security guard. (Tr. 338.) Plaintiff's  
21 DIB application alleges disability as of October 1, 2001, due to  
22 bipolar disorder, a blood disorder, and juvenile epilepsy. (Tr.  
23 67.) After the initial denial, plaintiff alleged she additionally  
24 suffers from scoliosis, ADHD, breast lumps, migraines and "seizure  
25 jolts daily." (Tr. 125.)

#### 26 **SEQUENTIAL EVALUATION PROCESS**

27 The Social Security Act (the "Act") defines "disability"  
28

1 as the "inability to engage in any substantial gainful activity by  
2 reason of any medically determinable physical or mental impairment  
3 which can be expected to result in death or which has lasted or  
4 can be expected to last for a continuous period of not less than  
5 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
6 Act also provides that a Plaintiff shall be determined to be under  
7 a disability only if any impairments are of such severity that a  
8 plaintiff is not only unable to do previous work but cannot,  
9 considering plaintiff's age, education and work experiences,  
10 engage in any other substantial gainful work which exists in the  
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
12 Thus, the definition of disability consists of both medical and  
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
14 (9<sup>th</sup> Cir. 2001).

15 The Commissioner has established a five-step sequential  
16 evaluation process for determining whether a person is disabled.  
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
18 is engaged in substantial gainful activities. If so, benefits are  
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
20 not, the decision maker proceeds to step two, which determines  
21 whether plaintiff has a medically severe impairment or combination  
22 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
23 416.920(a)(4)(ii).

24 If plaintiff does not have a severe impairment or combination  
25 of impairments, the disability claim is denied. If the impairment  
26 is severe, the evaluation proceeds to the third step, which  
27 compares plaintiff's impairment with a number of listed  
28

1 impairments acknowledged by the Commissioner to be so severe as to  
2 preclude substantial gainful activity. 20 C.F.R. §§  
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
4 App. 1. If the impairment meets or equals one of the listed  
5 impairments, plaintiff is conclusively presumed to be disabled.  
6 If the impairment is not one conclusively presumed to be  
7 disabling, the evaluation proceeds to the fourth step, which  
8 determines whether the impairment prevents plaintiff from  
9 performing work which was performed in the past. If a plaintiff  
10 is able to perform previous work, that Plaintiff is deemed not  
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
12 At this step, plaintiff's residual functional capacity ("RFC")  
13 assessment is considered. If plaintiff cannot perform this work,  
14 the fifth and final step in the process determines whether  
15 plaintiff is able to perform other work in the national economy in  
16 view of plaintiff's residual functional capacity, age, education  
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish  
20 a *prima facie* case of entitlement to disability benefits.  
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
22 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
23 met once plaintiff establishes that a physical or mental  
24 impairment prevents the performance of previous work. The burden  
25 then shifts, at step five, to the Commissioner to show that (1)  
26 plaintiff can perform other substantial gainful activity and (2) a  
27 "significant number of jobs exist in the national economy" which  
28

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
2 Cir. 1984).

3 Plaintiff has the burden of showing that drug and alcohol  
4 addiction (DAA) is not a contributing factor material to  
5 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9<sup>th</sup> Cir.  
6 2001). The Social Security Act bars payment of benefits when drug  
7 addiction and/or alcoholism is a contributing factor material to a  
8 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);  
9 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there  
10 is evidence of DAA and the individual succeeds in proving  
11 disability, the Commissioner must determine whether the DAA is  
12 material to the determination of disability. 20 C.F.R. §§  
13 404.1535 and 416.935. If an ALJ finds that the claimant is not  
14 disabled, then the claimant is not entitled to benefits and there  
15 is no need to proceed with the analysis to determine whether  
16 substance abuse is a contributing factor material to disability.  
17 However, if the ALJ finds that the claimant is disabled, then the  
18 ALJ must proceed to determine if the claimant would be disabled if  
19 he or she stopped using alcohol or drugs.

#### 20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a  
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
23 the Commissioner's decision, made through an ALJ, when the  
24 determination is not based on legal error and is supported by  
25 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995  
26 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
27 1999). "The [Commissioner's] determination that a plaintiff is  
28

1 not disabled will be upheld if the findings of fact are supported  
2 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
3 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
4 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
5 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
6 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
7 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
8 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
9 evidence as a reasonable mind might accept as adequate to support  
10 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
11 (citations omitted). "[S]uch inferences and conclusions as the  
12 [Commissioner] may reasonably draw from the evidence" will also be  
13 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
14 On review, the Court considers the record as a whole, not just the  
15 evidence supporting the decision of the Commissioner. *Weetman v.*  
16 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
17 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to  
19 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
20 evidence supports more than one rational interpretation, the Court  
21 may not substitute its judgment for that of the Commissioner.  
22 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
23 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
24 substantial evidence will still be set aside if the proper legal  
25 standards were not applied in weighing the evidence and making the  
26 decision. *Browner v. Secretary of Health and Human Services*, 839  
27 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
28

1 evidence to support the administrative findings, or if there is  
2 conflicting evidence that will support a finding of either  
3 disability or nondisability, the finding of the Commissioner is  
4 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
5 1987).

#### 6 **ALJ'S FINDINGS**

7 At the outset the ALJ found plaintiff was last insured  
8 through September 30, 2002, for purposes of her DIB claim. (Tr.  
9 25.) The ALJ found at step one that plaintiff has not engaged in  
10 substantial gainful activity since onset. (Tr. 25.) At steps two  
11 and three, the ALJ found that plaintiff suffers from seizure  
12 disorder, borderline intellectual functioning, and personality  
13 disorder, impairments that are severe but do not meet or medically  
14 equal a Listed impairment. (Tr. 25, 30-31.) The ALJ found  
15 plaintiff less than fully credible. (Tr. 33-34.) The ALJ  
16 assessed plaintiff's RFC, which included several non-exertional  
17 limitations. (Tr. 31.) At step four, the ALJ asked a vocational  
18 expert if someone with plaintiff's background and limitations  
19 could perform any of her past work. The VE answered that  
20 plaintiff's RFC is consistent with performing past work as a  
21 dishwasher. The ALJ relied on this testimony and found plaintiff  
22 not disabled at step four. (Tr. 35.)

#### 23 **ISSUES**

24 Plaintiff contends that the Commissioner erred as a matter of  
25 law when he determined credibility and weighed the medical  
26 evidence. Specifically, plaintiff alleges the ALJ failed to  
27 properly assess (1) the credibility of plaintiff and her roommate;  
28

1 (2) the limitations caused by plaintiff's seizure disorder; and  
2 (3) the June and November 2006 evaluations by Gary J. Lauby, Ph.D.  
3 Plaintiff further alleges ALJ Say failed to include all of the  
4 limitations assessed by consulting physician James E. Bailey,  
5 Ph.D., in the hypothetical he [the ALJ] asked the VE. (Ct. Rec. 15  
6 at 9-15, Ct. Rec. 18.)

7 The Commissioner responds that the ALJ appropriately weighed  
8 the evidence and asks that the decision be affirmed. (Ct. Rec. 17  
9 at 6.)

#### 10 DISCUSSION

##### 11 A. Weighing medical evidence

12 In social security proceedings, the claimant must prove the  
13 existence of a physical or mental impairment by providing medical  
14 evidence consisting of signs, symptoms, and laboratory findings;  
15 the claimant's own statement of symptoms alone will not suffice.  
16 20 C.F.R. § 416.908. The effects of all symptoms must be  
17 evaluated on the basis of a medically determinable impairment  
18 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
19 416.929. Once medical evidence of an underlying impairment has  
20 been shown, medical findings are not required to support the  
21 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
22 341, 345 (9<sup>th</sup> Cr. 1991).

23 A treating physician's opinion is given special weight  
24 because of familiarity with the claimant and the claimant's  
25 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
26 Cir. 1989). However, the treating physician's opinion is not  
27 "necessarily conclusive as to either a physical condition or the  
28



1 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
2 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
3 a treating physician than an examining physician. *Lester v.*  
4 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
5 weight is given to the opinions of treating and examining  
6 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
7 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
8 physician's opinions are not contradicted, they can be rejected  
9 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
10 If contradicted, the ALJ may reject an opinion if he states  
11 specific, legitimate reasons that are supported by substantial  
12 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
13 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

14 In addition to the testimony of a nonexamining medical  
15 advisor, the ALJ must have other evidence to support a decision to  
16 reject the opinion of a treating physician, such as laboratory  
17 test results, contrary reports from examining physicians, and  
18 testimony from the claimant that was inconsistent with the  
19 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
20 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
21 Cir. 1995).

22 Plaintiff contends that the ALJ erred when he weighed the  
23 June and November 2006 evaluations by Dr. Lauby. (Ct. Rec. 15 at  
24 13-14.) The Commissioner responds that the ALJ's stated reason  
25 for rejecting these opinions - that they are inconsistent with the  
26 balance of psychological reports in the record - is specific,  
27 legitimate and supported by substantial evidence. (Ct. Rec. 17 at  
28

1 10-11.)

2 With respect to Dr. Lauby's first evaluation, the ALJ states,  
3 in part:

4 The claimant reported experiencing seizures that were  
5 violent and frequent, only partially controlled in  
6 the past by Depakote. She reported being raped at  
7 the age of 18 and psychiatrically hospitalized at  
8 that time. She also reported a history of treatment  
9 for [ADHD], but stated none of the drugs worked for  
10 her and she turned to street drugs, an amphetamine  
11 know[n] as "CR" about six years ago, using for three  
12 years. She stated she stopped using the drug 10 years  
13 ago without participation in formal treatment. She  
14 stressed she had been drug free for 10 years. She  
15 reported a blood disorder since birth, but never  
16 required treatment. She believed she had scoliosis  
17 . . . .

18 She stated she was in special education classes  
19 throughout her years in school due to her [ADHD],  
20 but graduated from high school. . . She enrolled in  
21 college but dropped out after one semester. She last  
22 worked 2½ years ago. She lived with her roommate and  
23 was able to care for herself unless she was having  
24 seizures. . .

25 Her full scale [IQ] score placed her in lower limit  
26 of the average range of intellectual functioning.  
27 [Plaintiff's] Trailmaking . . Part B performance fell  
28 into the defective range. MMPI-2 responses were  
significantly distorted, possibly by reading errors  
and/or exaggerated complaints. Dr. Lauby diagnosed  
learning disorder, [nos], [ADHD, nos], depressive  
disorder, nos, personality disorder with paranoid  
features, and a GAF of 60. Prognosis appeared guarded. Her  
cognitive limitations would likely result in  
moderate limitations. Social factors were severe.  
Neuropsychological examination was recommended.

(Tr. 28-29, citing Exhibit 10F at Tr. 229-236; see also Exhibit  
14F at Tr. 264-270.)

The ALJ summarizes Dr. Lauby's assessed limitations:

"Dr. Lauby opined at Exhibit 10F that the claimant had severe  
interpersonal problems, with marked and severe restrictions in  
work-related functioning. These restrictions are inconsistent  
with the balance of the psychological reports in the record, as

1 outlined above. Therefore, little weight is given to Dr. Lauby's  
2 opinion in this matter." (Tr. 34.)

3 The other psychological reports to which the ALJ refers  
4 include the March 23, 2005, report of Scott Mabee, Ph.D., who  
5 opined after evaluation and testing that plaintiff appears to have  
6 adequate cognitive and social abilities for self-sufficiency in  
7 the community. (Tr. 34, relying on Tr. 179.) The ALJ relied on  
8 the August 2005 opinions of examining psychologists Kayleen Islam-  
9 Zwart, Ph. D, and Mahlon Dalley, Ph.D., who opined after testing  
10 that "there did not appear to be any psychological reason"  
11 plaintiff would be precluded from employment. (Tr. 27, 34,  
12 relying on Exhibit 8F at Tr. 215-222.) The ALJ observes that  
13 these professionals opined plaintiff's Global Assessments of  
14 Functioning<sup>1</sup> is 65 and 70, respectively, indicating only mild  
15 symptoms in social or occupational functioning. (Tr. 27.)

16 To aid in weighing the conflicting medical evidence, the ALJ  
17 evaluated plaintiff's credibility and found her less than fully  
18 credible. (Tr. 33-34.) Credibility determinations bear on  
19 evaluations of medical evidence when an ALJ is presented with  
20 conflicting medical opinions or inconsistency between a claimant's  
21 subjective complaints and diagnosed condition. *See Webb v.*  
22 *Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

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23  
24 <sup>1</sup>A GAF (Global Assessment of Functioning) of 61-70  
25 indicates some mild symptoms (e.g., depressed mood and mild  
26 insomnia) or some difficulty in social, occupational, or  
27 school functioning (e.g., occasional truancy, or theft within the  
28 household), but generally functioning pretty well, has  
some meaningful interpersonal relationships. DIAGNOSTIC  
AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION  
(DSM-IV), at p. 32.

1 It is the province of the ALJ to make credibility  
2 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
3 1995). However, the ALJ's findings must be supported by specific  
4 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
5 Cir. 1990). Once the claimant produces medical evidence of an  
6 underlying medical impairment, the ALJ may not discredit testimony  
7 as to the severity of an impairment because it is unsupported by  
8 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
9 1998). Absent affirmative evidence of malingering, the ALJ's  
10 reasons for rejecting the claimant's testimony must be "clear and  
11 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
12 "General findings are insufficient: rather the ALJ must identify  
13 what testimony not credible and what evidence undermines the  
14 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
15 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

16 The ALJ relied on several factors when he assessed  
17 credibility, including plaintiff's inconsistent statements. The  
18 ALJ compared plaintiff's testimony that she did not know the  
19 number of seizures she experienced (because she had no memory  
20 afterward) with the numerous times plaintiff specified the number  
21 of seizures she had experienced, including 4 in 6 months (Exhibit  
22 4F), 2 per month (Exhibits 5F, 12F, 13F), and  
23 1-2 per week (Exhibits 6E, 8E.) (Tr. 33.) The ALJ noted that  
24 while plaintiff told Dr. Lauby her seizures were violent and  
25 frequent, she did not give this description to other examining  
26 professionals, including Charles Brondos, M.D., a neurologist.  
27 (Tr. 33.)

28 The ALJ notes that plaintiff has described disabling seizures

1 preventing employment. Yet, at the time of the examination by  
2 Drs. Islam-Zwart and Dalley, plaintiff indicated she was working  
3 part-time, denied any problems working, and believed she could  
4 work full time if the opportunity arose. (Tr. 33.) The ALJ  
5 observes that early in the record [mainly prior to 2007] plaintiff  
6 failed to comply with taking prescribed anti-convulsant  
7 medication, presumably due to cost, although as noted in 2005, she  
8 worked part-time. (Tr. 33.) The ALJ points out that in August of  
9 2006, plaintiff told Dr. Brondos her last seizure was a month  
10 earlier. Thereafter, she was "seen several times in the emergency  
11 room with various pain complaints (Exhibit 15F) and did not  
12 mention any seizures." (Tr. 33.) The ALJ also considered  
13 plaintiff's exaggerated scores on the MMPI-2 on two occasions, and  
14 her inconsistent reports of substance abuse and periods of  
15 unemployment. (Tr. 33-34.)

16 The ALJ notes plaintiff's daily activities included carrying  
17 out home chores, animal care, and self care; working part-time  
18 (under SGA levels) providing concert security; involvement with a  
19 group of friends; taking the bus or walking to her destinations;  
20 camping for fun; being in a committed relationship for two years;  
21 shopping alone or with her roommate, and making her own financial  
22 decisions. (Tr. 26-27.) Even under the higher standard, the  
23 ALJ gave clear and convincing reasons, supported by substantial  
24 evidence, for finding plaintiff less than fully credible. The  
25 record as a whole does not support plaintiff's argument that the  
26 ALJ improperly considered plaintiff's medication noncompliance  
27 (due to an inability to pay for medication) when he assessed her  
28 credibility.

1 When he assessed the conflicting medical evidence, the ALJ  
2 considered the record as a whole. His stated reasons for  
3 discounting some of Dr. Lauby's assessed limitations are specific,  
4 legitimate, and supported by substantial evidence. They include  
5 ALJ Say's decision to adopt the milder limitations assessed by  
6 examining psychologists Drs. Mabee, Islam-Zwart, and Dalley.

7 Plaintiff alleges that the ALJ failed to give germane reasons  
8 for discounting the credibility of plaintiff's roommate, as  
9 required. (Ct. Rec. 15 at 13.) The Commissioner answers that the  
10 ALJ discounted this testimony for the same reasons as plaintiff's,  
11 namely, contradictory medical evidence and inconsistent  
12 statements. (Ct. Rec. 17 at 9-10.)

13 The ALJ noted Ms. Liljestrand's testimony that she has seen  
14 plaintiff have about 15-20 seizures a month since September of  
15 2003. According to her testimony, a seizure lasts about 15  
16 minutes. Plaintiff's eyes roll back, she drops to the floor, and  
17 she bites her tongue. Plaintiff is very disoriented after a  
18 seizure and does not remember it or her surroundings. The  
19 seizures have improved somewhat, but not significantly. Ms.  
20 Liljestrand indicated the longest time without a seizure is a  
21 week. (Tr. 33.) The ALJ observes:

22 "This high number of seizures [15-20 a month since September  
23 of 2003] would prevent all work, however, the record shows that  
24 she has been able to obtain jobs throughout the period at issue  
25 here." (Tr. 33.) As the Commissioner observes, the ALJ also  
26 compared plaintiff's earlier complaints of seizures (at the time  
27 she alleged she could not afford medication) with her later lack  
28 of seizure complaints while taking anti-convulsant medication

(Keppra). (Ct. Rec. 17 at 8-9, referring to Tr. 33-34, 279-284.) Both are germane reasons, supported by the record, for discrediting the lay testimony.

**B. Hypothetical**

Plaintiff argues ALJ Say erred by omitting limitations assessed by consulting psychologist James Bailey, Ph. D., in his hypothetical question to the VE. (Ct. Rec. 15 at 14-15.) The Commissioner responds that the ALJ properly relied on the narrative report rather than the check box form, and any error in omitting their "preclusion on high levels of cooperation" is harmless since a dishwasher/kitchen helper is unskilled work requiring insignificant people skills. (Ct. Rec. 17 at 12-13.)

Plaintiff's argument is based on an incomplete reading of the record. In assessing plaintiff's RFC, ALJ Say opined plaintiff is capable of some multi-step tasks, can do concrete tasks with few academic demands, is capable of only superficial public interaction, and responds slowly to change. (Tr. 31, 340.) These limitations are basically consistent with Dr. Bailey's narrative opinion. (Tr. 213.) The only omission by the ALJ is Dr. Bailey's limitation that plaintiff "could work around others, but not with high levels of cooperation." (Tr. 213.) With respect to Dr. Bailey's report, ALJ Say stated:

"The opinions of the non-examining State Agency consultants tend to support the undersigned's conclusions [see Exhibits 6F - Fuller, M.D. and 7F - Bailey]; however, additional evidence was received subsequent to their opinions, including testimony at the hearing, making a new determination necessary in this case." (Tr. 34.)

1 ALJ Say's analysis is consistent with the approach approved  
2 recently by *Stubbs-Danielson v. Astrue*, 539 F. 3d 1169 (9<sup>th</sup> Cir.  
3 2008):

4 The ALJ translated Stubb-Danielson's condition,  
5 including the pace and mental limitations, into  
6 the only concrete restrictions available to him  
7 - Dr. Eather's recommended restriction to "simple  
8 tasks." This does not, as [plaintiff] contends,  
9 constitute a rejection of Dr. McCollum's opinion.  
10 Dr. Easter's assessment is consistent with Dr.  
11 McCollum's 2005 MRFCA, which found [plaintiff]  
12 is "not significantly limited" in her ability to  
13 "carry out very short simple instructions,"  
14 "maintain attention and concentration for extended  
15 periods," and sustain an ordinary routine without  
16 special supervision.

17 *Stubbs-Danielson*, 539 F. 3d at 1174. The Court noted that an  
18 ALJ's assessment of a claimant adequately captures restrictions  
19 related to concentration, persistence or pace where the  
20 assessment is consistent with restrictions identified in the  
21 medical testimony. (*Id.*)

22 ALJ Say's RFC and hypothetical incorporated restrictions  
23 consistent with the medical evidence. He indicated that he was  
24 not relying solely on the opinions of the consultants; rather,  
25 on all of the evidence. Even if omitting Dr. Bailey's limitation  
26 on high levels of cooperation could properly be considered error,  
27 it appears harmless in this case because all of plaintiff's  
28 limitations relevant to unskilled work were included in the ALJ's  
29 hypothetical.

30 The ALJ is responsible for reviewing the evidence and  
31 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
32 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
33 trier of fact, not this court, to resolve conflicts in evidence.  
34 *Richardson*, 402 U.S. at 400. The court has a limited role in



1 determining whether the ALJ's decision is supported by substantial  
2 evidence and may not substitute its own judgment for that of the  
3 ALJ, even if it might justifiably have reached a different result  
4 upon de novo review. 42 U.S.C. § 405 (g).

5 The ALJ weighed the evidence as a whole and concluded  
6 plaintiff would be able to perform her past relevant unskilled  
7 work as a dishwasher. The ALJ's assessment of the medical and  
8 other evidence is supported by the record and free of legal  
9 error.

#### 10 CONCLUSION

11 Having reviewed the record and the ALJ's conclusions, this  
12 court finds that the ALJ's decision is free of legal error and  
13 supported by substantial evidence..

#### 14 IT IS ORDERED:

15 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
16 **GRANTED.**

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
18 **DENIED.**

19 The District Court Executive is directed to file this Order,  
20 provide copies to counsel for Plaintiff and Defendant, enter  
21 judgment in favor of Defendant, and **CLOSE** this file.

22 DATED this 22nd day of December, 2008.

23 s/ James P. Hutton

24 JAMES P. HUTTON  
25 UNITED STATES MAGISTRATE JUDGE  
26  
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